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In 1983 the North Carolina General Assembly passed the Safe Roads Act.[1] Enacted in response to the growing public concern over drinking and driving, the Act brings about many changes in the state's driving-while-intoxicated (DWI) laws. This note examines the constitutionality of section 22 of the Act,[2] which authorizes the use of roadblocks as an enforcement tool against drunken driving, and section 26 of the Act,[3] which governs procedure for chemical testing for intoxication and the use of test results at trial. The note concludes that the roadblock provision has minor constitutional flaws that can be remedied easily, and that the chemical testing statute, while raising more serious constitutional issues, probably will also withstand constitutional attack.

Section 22 of the Act[4] authorizes law enforcement agencies to conduct impaired driving checks (better known as roadblocks) to enforce the DWI laws. While many states have resorted to the roadblock as a method of detecting DWI offenders,[5] North Carolina is the first state to enact a law expressly sanctioning the use of this technique. The law establishes three prerequisites for a valid DWI check. First, the police must develop a "systematic plan in advance that takes into account the likelihood of detecting impaired drivers, traffic conditions, number of vehicles to be stopped, and the convenience of the motoring public."[6] Second, the police must designate in advance "the pattern both for stopping vehicles and for requesting drivers that are stopped to submit to alcohol screening tests."[7] Contingency plans may be developed that permit deviation from the pattern upon the occurrence of specified conditions, but no individual officer may be given discretion regarding which vehicle is stopped or which driver is subjected to an alcohol screening test.[8] Finally, the police must mark "the area in which checks are conducted to advise the public that an authorized impaired driving check is being made."[9]

Any roadblock stop made pursuant to section 20-16.3A is a "seizure" within the meaning of the fourth amendment to the United States Constitu-

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1. Safe Roads Act of 1983, 1983 N.C. Adv. Legis. Serv. ch. 435.

2. *Id.* § 22 (codified at N.C. GEN. STAT. § 20-16.3A (1983)).

3. *Id.* § 26 (codified at N.C. GEN. STAT. § 20-139.1 (1983)).

4. *Id.* § 22 (codified at N.C. GEN. STAT. § 20-16.3A (1983)).

5. *See* Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1460 n.16 (1983).

6. N.C. GEN. STAT. § 20-16.3A(1) (1983).

7. *Id.* § 20-16.3A(2).

8. *Id.* Notwithstanding the limits placed on the exercise of discretion by individual officers, the section also provides that any officer may request a screening test of a driver if he has independent adequate grounds under the general preliminary test statute, *id.* § 20-16.3.

9. *Id.* § 20-16.3A(3).

tion.[10] The fourth amendment[11] protects citizens against searches and seizures that are unreasonable; therefore, the North Carolina statute must satisfy a fourth amendment analysis to be constitutional.

The United States Supreme Court's decision in *Delaware v. Prouse*[12] provides the proper framework for analyzing the constitutionality of North Carolina's roadblock statute. In *Prouse* the Court considered the constitutionality of Delaware's practice of randomly stopping motorists for license and registration checks. The Court stated that the "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[13] Applying this test, the Court held that the intrusiveness of the stop outweighed the state's interest in promoting safety on its roads. In striking down the Delaware practice, the Court relied heavily on its prior decision in *United States v. Brignoni-Ponce*.[14] In that case the Court had considered the constitutionality of roving border patrols that stopped cars at random to search for evidence of illegal aliens. The Court held that the intrusiveness of the stop, which created substantial anxiety for the detained motorist, interfered with his freedom of movement, presented the opportunity for abuse of discretion by individual officers, and outweighed the strong state interest in policing the border.[15] The Court held that such an intrusion could be justified only by a showing of reasonable suspicion.[16] The *Prouse* Court found Delaware's practice equally intrusive, and further questioned whether randomly stopping cars advanced the state's safety interest any more than did the more conventional practice of stopping cars based on observed violations.[17] Finally, noting that the same potential for abuse of discretion was present in *Prouse* as in *Brignoni-Ponce*, the Court held Delaware's practice unconstitutional in the absence of some reasonable, articulable suspicion that the driver in question should be stopped.[18]

Despite holding Delaware's practice unconstitutional, the Court implied in dicta that a checkpoint stop at which all oncoming traffic was questioned would be constitutional even without reasonable suspicion.[19] This conclusion

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10. Delaware v. Prouse, 440 U.S. 648, 653 (1979).

11. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV

12. 440 U.S. 648 (1979).

13. *Id.* at 654 (footnote omitted). *Cf.* Terry v. Ohio, 392 U.S. 1 (1968) (warrantless "stop and frisk" for weapons constitutional if based on reasonable articulable suspicion of criminal activity). Reasonable suspicion permits the officer to make a brief investigatory stop, but a full search or seizure is unconstitutional unless based upon probable cause, which requires a higher quantum of proof.

14. 422 U.S. 873 (1975)..

15. *Id.* at 882, 884.

16. *Id.*

17. *Prouse*, 440 U.S. at 657-60.

18. *Id.* at 661, 663.

19. *See id.* at 663. Justice Blackmun suggested that a nonrandom stop at which less than

was based on the Court's prior holding in *United States v. Martinez-Fuerte*.[20] In that case a permanent border checkpoint at which all motorists on an interstate highway were required to slow for inspection for signs of illegal aliens was upheld as constitutional. The permanent checkpoint in *Martinez-Fuerte* was distinguished from the roving patrols disapproved of in *Brignoni-Ponce* because it involved a lesser degree of intrusion and a lesser risk of officer abuse of discretion.[21] A roadblock at which all cars are stopped briefly would be more akin to the permanent stop upheld in *Martinez-Fuerte* than to the discretionary stop disapproved in *Brignoni-Ponce*. Thus, such a roadblock would be constitutional even if conducted without reasonable suspicion.

Although the Supreme Court has not yet considered a case specifically involving a DWI roadblock, the Court would apply a test similar to that used in *Prouse*. Lower courts considering the constitutionality of roadblocks for drunken-drivers have applied the *Prouse* test, weighing the intrusiveness of the stop in question against the state interest advanced by the police practice.[22] Courts generally have upheld stops that conformed with the procedure suggested in the *Prouse* dicta, emphasizing the lesser degree of intrusion involved in such a stop and the important state interest in reducing the incidence of drunken driving.[23] For example, in *State v. Coccomo*[24] a New Jersey superior court upheld a roadblock at which every fifth car was stopped for license and registration checks, during the course of which the officer looked for signs of intoxication.

Not all state DWI roadblocks have been upheld under the standards established in *Prouse*. Courts that have struck down DWI roadblocks have done so primarily on three grounds: (1) too much discretion vested in the officers conducting the roadblocks, due to the lack of specific directions or guidelines

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100% of the cars were stopped (for example, every tenth car) also would be constitutional. *Id.* at 664 (Blackmun, J., concurring). This reasoning has been adopted by some state courts. *See, e.g.*, State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980) (every fifth car stopped by police).

20. 428 U.S. 543 (1976).

21. *Id.* at 560. Because all motorists were required to slow, the subjective intrusiveness of the stop was lesser than in *Brignoni-Ponce*. The checkpoint stop was not as unsettling to the motorist as the individual stop by a roving border patrol. A final factor distinguishing *Martinez-Fuerte* was the presence of signs on the highway notifying motorists of the immigration checkpoint, thus informing them that the stop was a valid exercise of the police power of the state and reducing the level of anxiety generated by the stop.

22. *See* State *ex rel.* Ekstrom v. Justice Court of Ariz., 136 Ariz. 1, 663 P.2d 992 (1983); Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980); *see also* State v. Cline (unreported Maryland trial court opinion), *discussed in* Note, *supra* note 5, at 1471.

23. The Supreme Court recently has acknowledged the national importance of the drunken driving problem. *See* South Dakota v. Neville, 103 S. Ct. 916, 920 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation."). In *Neville* the Supreme Court held that the introduction into evidence of a defendant's refusal to submit to chemical testing did not violate defendant's fifth amendment right against self-incrimination. The Court reasoned that the privilege did not attach to the refusal because the refusal had not been "coerced." The North Carolina Court of Appeals has reached the same conclusion, though by different reasoning, regarding N.C. GEN. STAT. § 20-139.1(f) (1983), which expressly provides that defendant's refusal to submit to testing shall be admissible in a criminal proceeding against him. *See* State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976) (physical test results not "testimonial" in nature and thus not within scope of fifth amendment).

24. 177 N.J. Super. 575, 427 A.2d 131 (1980).

from higher authorities on the exact procedure to be followed;[25] (2) inadequate notice to drivers that they were being stopped pursuant to a valid DWI roadblock;[26] and (3) lack of proof that the roadblock technique is any more effective in detecting drunk drivers than the routine practice of stopping cars based on observed driving irregularities.[27] Applying the balancing test of *Prouse*, these courts have found that the state interest promoted by the stopping of motorists was insufficient to justify the intrusiveness of the roadblocks in question.

Although North Carolina's new roadblock statute has constitutional problems of its own, it avoids these potential problems.[28] The problem of lack of specific guidelines from higher authorities is avoided by the requirement that the law enforcement agency develop a "systematic plan in advance" for conducting an impaired driving check.[29] Officer discretion regarding which cars are stopped is limited by the provision requiring designation in advance of the pattern both for stopping vehicles and for requesting alcohol screening tests.[30] The problem of inadequate notice to drivers about the reason for the stop is avoided by section 20-16.3A(3), which requires that the area in which cars are being stopped be marked to notify the public that a statutory impaired driving check is being conducted.[31] If the procedure established by the new statute is followed by the police, the practice almost surely will withstand the constitutional challenges that have invalidated other roadblocks.

While North Carolina's statute avoids the problems presented by prior roadblocks, it may be subject to constitutional challenge on other grounds. The legislature properly was concerned with unbridled officer discretion, and thus required that the roadblocks be conducted according to a predetermined pattern.[32] The statute fails, however, to delineate the procedures that may be employed once a vehicle has been stopped.[33] It speaks of "the pattern both for stopping vehicles *and* for requesting drivers . . . to submit to alcohol screening tests."[34] This use of the word "pattern" suggests that the North Carolina

25. *See* State *ex rel* Ekstrom v. Justice Court of Ariz., 136 Ariz. 1, 4-5, 663 P.2d 992, 996 (1983); Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349, 353 (1983).

26. *See* State *ex rel.* Ekstrom v. Justice Court of Ariz., 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983).

27. *Id.* at 5, 663 P.2d at 996. The State argued that despite the intrusiveness of the roadblocks, the procedure was justified by the state's strong interest in apprehending drunk drivers. The court acknowledged that interest, but questioned whether the roadblock technique advanced the state interest any more than did less intrusive procedures.

28. The statute was drafted carefully. It is essentially a codification of constitutional law precedent in the roadblock field.

29. N.C. GEN. STAT. § 20-16.3A(1) (1983). *See supra* text accompanying note 6.

30. N.C. GEN. STAT. § 20-16.3A(2) (1983). *See supra* text accompanying note 7.

31. N.C. GEN. STAT. § 20-16.3A(3) (1983). *See supra* text accompanying note 9.

32. N.C. GEN. STAT. § 20-16.3A(2) (1983).

33. The term "impaired driving check" is used as a term of art in the statute, yet it is not defined in the definitional section of the motor vehicle chapter, *id.* § 20-4.01. Section 20-16.3A states that it does not limit "the authority of a law enforcement officer or agency to conduct a license check independently or in conjunction with the impaired driving check." The language implies that the "impaired driving check" is something more than just a license check, though the exact extent of the stop contemplated by the legislature is unclear.

34. *Id.* § 20-16.3A(2) (emphasis added).

statute would permit a scheme whereby drivers, once stopped, are required to submit to sobriety tests according to a pattern. For instance, every car is stopped for a routine check and every tenth driver is required to submit to an alcohol screening test. The fact that the roadblock statute authorizes the police to require a driver to submit to an alcohol screening test based on a random pattern rather than on reasonable suspicion gives rise to the best constitutional challenge to the statute.

The constitutionality of a police practice must be determined by weighing its intrusiveness against the state interest it advances. Even if a stop involves no officer discretion, it still may be unconstitutional because it intrudes too greatly on an individual's privacy. Most roadblocks consist of a brief stop, during which the motorist is required to produce his license and registration while the officer looks for signs of intoxication.[35] The stop is only minimally intrusive, and thus is constitutional. More intrusive subsequent measures, such as roadside sobriety tests, may be permissible, but generally only upon reasonable and articulable suspicion as described in *Prouse*.[36] The language of section 20-16.3A suggests, however, that alcohol screening tests could be administered even in the absence of reasonable suspicion. Under the Supreme Court's balancing tests developed in *Prouse* and the border search cases, requiring a driver to submit to further tests, if based neither on probable cause nor reasonable suspicion, is unconstitutional.[37] Subjecting a motorist to extended roadside testing entails a much greater intrusion, both in time delay and invasion of privacy, into the individual's fourth amendment rights than does the usual license and registration check. Such an extensive intrusion should be permitted only if based on reasonable, articulable suspicion that the driver is intoxicated.[38]

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35. *See* Note, *supra* note 5, at 1463.

36. *See, e.g.*, State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980). In *Coccomo* defendant was stopped according to a policy of stopping every fifth vehicle. Defendant was asked to produce his license, registration, and insurance card. When the officer noticed that defendant had bloodshot eyes and alcohol on his breath, he requested defendant to get out of the car. Defendant failed two roadside sobriety tests and was arrested. The officer's inital observations concerning defendant's breath and eyes provided reasonable suspicion to justify the further tests.

37. A stop requiring a motorist to submit to an alcohol screening test is a far greater intrusion than the warrantless and suspicionless stops authorized by the Supreme Court in *Martinez-Fuerte* and *Prouse*. In *Martinez-Fuerte* the average length of the stop, even for those referred to the secondary inspection area, was 3 to 5 minutes, and inquiry was limited to questioning about citizenship and immigration status. *Martinez-Fuerte*, 428 U.S. at 546. The detention implicitly approved by dicta in *Prouse* similarly was limited both in duration and scope of inquiry. *Prouse*, 440 U.S. at 663. Neither case can be read as approving a warrantless and suspicionless intrusion as extensive as a roadside sobriety test. Under N.C. GEN. STAT. § 20-16.3(a)(1) (1983), preliminary testing may be performed upon a reasonable belief that the driver has consumed alcohol *and* has committed a moving violation. The same "reasonable belief" standard also should apply to roadside tests administered in the context of an impaired driving check.

38. *See* Note, *supra* note 5, at 1485-86 (arguing that "articulable suspicion" should be required before extended DWI investigation may be performed). The commentator argues that imposing such a requirement does not hinder the advancement of the state's interest in apprehending drunk drivers. A recent case, People v. Carlson, 52 U.S.L.W. 2465 (Colo. Feb. 28, 1984), imposed an even higher standard, requiring that probable cause be found before roadside sobriety tests may be performed. Probable cause requires a higher quantum of proof than reasonable, articulable suspicion. *See supra* note 13.

This potential constitutional problem could be remedied by a short amendment to the statute. The legislature need only add a statement that alcohol screening tests may not be administered according to a pattern, but must be based on reasonable suspicion.[39] Such a clarification would limit police inquiry at a roadblock to license and registration checks, clearly within the constitutional limits set by the Supreme Court in *Prouse*.

Section 26 of the Act[40] deals with chemical analysis for intoxication and admissibility of chemical test results. This section also raises important constitutional questions. Of particular significance is North Carolina General Statutes section 20-139.1(e1),[41] which allows admission of an affidavit certifying blood alcohol test results without requiring the analyst who performed the test to appear in court and testify. The analyst still may be required to appear, but only if subpoenaed by the defendant.[42] The results of blood alcohol concentration (BAC) tests are of great importance in any DWI proceeding,[43] and the new law exempting the chemical analyst from testifying raises serious questions about the criminal defendant's sixth amendment right to confront the witnesses against him.[44]

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39. Alternatively, the statute could be amended to provide that alcohol screening tests may be administered only in accordance with the requirements of N.C. GEN. STAT. § 20-16.3 (1983), the general preliminary test statute. *See supra* note 37. The problem also could be remedied by a judicial reading of the "pattern" for requiring drivers to submit to screening tests to mean that further testing may only be required if certain predetermined factors indicating possible intoxication are present. Such an interpretation would be a strained reading of the statutory language, however, and an amendment expressly establishing a reasonable suspicion standard would be preferable.

40. Safe Roads Act of 1983, 1983 N.C. Adv. Legis. Serv. 435 § 26 (codified at N.C. GEN STAT. § 20-139.1 (1983)). Section 26 of the Act rewrote the old § 20-139.1, adding new subsections while changing some language in the sections already in existence.

41. N.C. GEN. STAT. § 20-139.1(e1) (1983).

42. *Id.*

43. Although results of BAC tests in some states give rise to specified presumptions regarding defendant's guilt or innocence, *see, e.g.*, KAN. STAT. ANN. § 8-1005 (1982), North Carolina makes driving with a BAC of .10% or greater a separate offense. *See* N.C. GEN. STAT. § 20-138.1(a)(2) (1983). The new law also allows for a 10 day pretrial license revocation if defendant has a BAC of .10% or more within a relevant time after driving. *See id.* § 20-16.5(b)(4)(a). Given the potential ramifications of an unfavorable test, the results of chemical analysis are of utmost importance to defendant.

The criminalization of a .10% blood alcohol level is another aspect of the drunk driving law that may be subject to constitutional attack. Although the statute has been upheld against an arbitrariness challenge as a constitutional exercise of the police power of the state, *see* State v. Basinger, 30 N.C. App. 45, 226 S.E.2d 216 (1976), one commentator has suggested that such statutes may be unconstitutionally vague. *See* Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301, 335 (1983). The premise of this argument is that the driver has no way of knowing his precise BAC, and thus cannot conform his behavior to the statutory norm. While North Carolina courts have not yet addressed this argument, the courts of other states have rejected it. *See* Roberts v. State, 329 So. 2d 296 (Fla. 1976); Greaves v. State, 528 P.2d 805 (Utah 1974). Given the increasing public concern over drunken driving, it is unlikely that a North Carolina court would invalidate so integral a provision of the statute.

44. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The confrontation clause is applicable to the states by incorporation into the due process requirements of the fourteenth amendment. *See* Pointer v. Texas, 380 U.S. 400 (1965). The North Carolina Constitution has a provision analogous to the sixth amendment. *See* N.C. CONST. art. I, § 23.

The constitutional issue raised by the new version of section 20-139.1 is best understood by comparing it to its predecessor. Under the prior statutory scheme, the validity of a chemical analysis hinged on whether it had been performed in compliance with the requirements of the State Commission for Health Services, and whether it had been performed by a person possessing a valid permit issued by the Department of Human Resources.[45] Any failure to comply with these requirements rendered the test inadmissible, and the State had the burden of proving the validity of the chemical analysis.[46] For instance, in *State v. Gray*[47] the North Carolina Court of Appeals found prejudicial error in the state's failure to "lay the foundation" for the introduction of breathalyzer test results and granted defendant a new trial.[48]

The new section 20-139.1 preserves the valid procedure and valid permit requirements, and adds a further admissibility requirement that the instrument used to measure defendant's BAC must have had an up-to-date preventive maintenance record, according to regulations prescribed by the Commission for Health Services.[49] The important change is in the procedure for introducing the test results into evidence. Section 20-139.1(e1) provides that a properly executed affidavit of a chemical analyst is admissible, without further authentication, as evidence of: (1) defendant's blood alcohol level, (2) the time of the sample, (3) the type of analysis administered and procedure followed, (4) the type and status of the analyst's permit, and (5) the preventive maintenance record of the breath-testing instrument, if that is the method used, as reflected by its maintenance records.[50] This amendment obviates the need for any foundation-laying by the State, provided the analyst has executed a proper, sworn statement, because such a statement is automatically admissible.

An argument may be made that the admission into evidence of the chemical analyst's affidavit, without his live testimony, violates a defendant's sixth amendment right to confrontation. The North Carolina Supreme Court has held that the admission into evidence of a death certificate containing a hearsay and conclusory statement about a victim's cause of death violates an accused's right to confront the witnesses against him.[51] If the analyst's affidavit is analogized to the death certificate, it follows that admission of the affidavit

45. *See* N.C. GEN. STAT. § 20-139.1(b) (1983) (substantially preserving requirements of predecessor section). The requirements apply to testing of both breath and blood samples.

46. *See* State v. Powell, 279 N.C. 608, 184 S.E.2d 243 (1971); State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976); State v. Warf, 16 N.C. App. 431, 192 S.E.2d 37 (1972); State v. Caviness, 7 N.C. App. 541, 173 S.E.2d 12 (1970).

47. 28 N.C. App. 506, 221 S.E.2d 765 (1976).

48. *Id.* at 507, 221 S.E.2d at 766.

49. N.C. GEN. STAT. § 20-139.1(b2) (1983). The burden is on the defendant both to object to the evidence and to demonstrate that the required preventive maintenance procedures had not been performed.

50. *Id.* § 20-139.1(e1). The analyst is not required to swear to an affidavit, but may choose to do so for his own convenience. The analyst is required to record defendant's alcohol concentration and the time of collection of the sample, and to furnish a copy of this record to defendant or his attorney. *See id.* § 20-139.1(e).

51. *See* State v. Watson, 281 N.C. 221, 188 S.E.2d 289 (1972).

also is unconstitutional. The supreme court has indicated that the admission of chemical test results to prove the identity of a drug in a drug prosecution does not violate the right to confront.[52] This case, however, is distinguishable. The identity of a drug in a drug prosecution is seldom the ultimate issue in the case; more often the circumstances surrounding defendant's connection with the drug are being disputed. By contrast, in a DWI proceeding defendant's blood alcohol content is often the dispositive issue in the case, for a blood-alcohol level of .10 percent is a per se criminal violation in North Carolina.[53] Thus, it may be argued that convenience to the State, in not having to produce the chemical analyst, is outweighed by defendant's overriding interest in examining the analyst, whose report may be dispositive on the question of defendant's guilt or innocence, and that admission without the appearance of the analyst is unconstitutional.

Although this argument is persuasive, it overlooks the statute's provision that defendant may require the analyst to appear at trial by subpoenaing him as an adverse witness.[54] This provision would seem to satisfy the constitutional confrontation requirement, but two plausible arguments can be made that it does not. First, it may be unconstitutional to shift to defendant the burden of producing the analyst.[55] Second, the opportunity for direct examination as an adverse witness may be an inadequate substitute for cross-examination. The Supreme Court has recognized that cross-examination is an essential element of the sixth amendment's safeguards.[56] On conventional cross-examination defendant's counsel may impeach the testimony of the witness based on the statements he has made on direct, but this type of impeachment is not possible when the witness is subject only to direct examination, even as an adverse witness. Thus, it may be argued that giving a defendant the right to subpoena a chemical analyst under section 20-139.1(e1) is insufficient to guarantee an accused his constitutional right to confront the witnesses against him.

The best argument in favor of the statute's constitutionality is that defendant's sixth amendment rights are protected by his right to a new trial at the superior court level if he is convicted in district court.[57] Section 20-139.1(e1) provides that the analyst's affidavit is admissible without authentication in district court proceedings; therefore, the analyst would have to appear at trial in superior court. The right to a new trial guarantees the defendant an

52. *See In re* Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

53. *See* N.C. GEN. STAT. § 20-138.1(a)(2) (1983).

54. *See supra* text accompanying note 42.

55. In *In re* Winship, 397 U.S. 358 (1970), the Supreme Court held that the due process clause of the fourteenth amendment requires the state to prove a criminal defendant's guilt beyond a reasonable doubt. Because the chemical analyst is so important to the state's case, it may be argued that shifting to defendant the burden of producing this witness is unconstitutional under the general principles enunciated in *Winship*. *See e.g.*, Davis v. United States, 160 U.S. 469, 487 (1895) (burden of proof on the prosecution to prove defendant's guilt applies to every necessary element of offense).

56. *See* Pointer v. Texas, 380 U.S. 400, 404 (1965).

57. *See* N.C. GEN. STAT. § 15A-1431(b) (1983).

opportunity to cross-examine the analyst. It may be argued that the added time and expense required for a new trial in superior court place an unconstitutional burden on the defendant's exercise of his constitutional rights, but the Supreme Court has rejected this contention with regard to the criminal defendant's right to trial by jury.[58] Unless a court were to draw a distinction between the constitutional right to confront witnesses and the constitutional right to a trial by jury in a criminal case, an argument in favor of the statute based on the defendant's right to a new trial probably will be sufficient to overcome a sixth amendment challenge to the statute.

Precedent from other states also suggests that the statute is constitutional. The Virginia Code provides that when a blood sample is tested for alcohol content a certificate is to be executed stating the procedure and results of the test.[59] The certificate, when duly attested, is deemed admissible in any civil or criminal proceeding as evidence of the facts stated therein.[60] In *Kay v. United States*[61] the United States Court of Appeals for the Fourth Circuit considered a sixth amendment challenge to a prior version of the Virginia statute. The court upheld the constitutionality of the statute, stating that the sixth amendment was not intended "to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule."[62] The court further emphasized that the receipt of the certificate into evidence did not foreclose inquiry into the conduct of the test, but that such inquiries went to the weight of the evidence, and not to its admissibility.[63]

The certificate held constitutional in *Kay* is analogous to the affidavit executed by the chemical analyst under section 20-139.1(e1). The *Kay* decision, although not binding on North Carolina courts, is highly persuasive. It is unlikely that a North Carolina court would hold the provision unconstitutional in light of the decision in *Kay*. *Kay* may be distinguishable on the ground that Virginia's statute did not criminalize a .10 percent BAC, while North Carolina's DWI law does, and thus defendant's interest in cross-examining the analyst is greater in North Carolina. Although this distinction might lessen the importance a North Carolina court would give to the *Kay* holding, the case probably still would be given substantial weight. Taken together, an argument based on defendant's right to subpoena the analyst, his right to a new trial in superior court at which the analyst must appear, and the practice in other states as represented by *Kay* with respect to admission of blood test results in DWI cases, would be sufficient to uphold section 20-139.1(e1) against constitutional attack.

In conclusion, both statutes suffer from some constitutional defects. Section 20-16.3A (section 22 of the Safe Roads Act) seems to authorize an uncon-

58. *See* Ludwig v. Massachusetts, 427 U.S. 618, 626 (1976).

59. *See* VA. CODE § 18.2-268(e) (Supp. 1983).

60. *Id.* § 18.2-268(f). *See also* D.C. CODE ANN. § 40-717.2 (Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 10-306 (1984).

61. 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958).

62. *Id.* at 480.

63. *Id.*

stitutional intrusion into fourth amendment rights, but this problem can be eliminated by a short amendment without upsetting the basic thrust of the roadblock statute. Section 20-139.1(e1) (section 26 of the Safe Roads Act) on its face seems to deprive a defendant of his sixth amendment right to confront the witnesses against him. Other statutory provisions, however, such as the right to a new trial in a higher court at which the chemical analyst must appear, are sufficient to satisfy the requirements of the sixth amendment.

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